STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2014
v	No. 316504 Wayne Circuit Court
ROBERT CARL KAHLER, Defendant-Appellant.	LC No. 11-011320-FC

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct (victim less than 13 years of age), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (victim less than 13 years of age), MCL 750.520c(1)(a). Defendant was sentenced to 30 to 50 years' imprisonment for the first-degree criminal sexual conduct conviction, and 10 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that his convictions were not supported by sufficient evidence. We disagree.

Due process requires that the evidence establish guilt beyond a reasonable doubt in order to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We review de novo challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). The evidence is viewed in the light most favorable to the prosecution to determine whether a rational trier of fact could find that all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Deference is afforded to the factfinder's special ability to assess the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

MCL 750.520b(1)(a) provides:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

A conviction for first-degree criminal sexual conduct under this subsection thus requires proof that: "(1) penetration occurred with another person, and (2) the other person was 'under 13 years of age.'" *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). As defined by MCL 750.520a(r), "sexual penetration" is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

MCL 750.520c(1)(a) provides:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

Similar to first-degree criminal sexual conduct, a conviction under second-degree criminal sexual conduct requires proof that (1) the person engaged in sexual contact with another person, and (2) that other person was under 13 years old. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). "'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." MCL 750.520a(q).

At trial, the victim testified that, on numerous occasions prior to her thirteenth birthday, defendant forced her to perform fellatio on him. Additionally, the victim testified that she was awoken while staying the night at defendant's house by defendant placing his hand on her shirt and groping her breasts. On the basis of this testimony, and viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find the elements of first-degree and second-degree criminal sexual conduct were proved beyond a reasonable doubt. *Reese*, 491 Mich at 139. Regarding the second-degree criminal sexual conduct conviction, a rational jury could infer that defendant groped the victim's breasts for a sexual purpose, especially in light of the victim's testimony of other sexual assaults.

Defendant argues, however, that the victim's testimony was not credible or reliable because there were some inconsistencies regarding (1) the total number of times she claimed to have been forced to perform fellatio, and (2) her age at the time of the events. But the victim's testimony, even with minimal inconsistencies, still supported convictions under both MCL 750.520b and MCL 750.520c. And "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g." MCL 750.520h. Further, "[t]he credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Accordingly, there was sufficient evidence for a rational trier of fact to find defendant guilty beyond a reasonable doubt of both first-degree and second-degree criminal sexual conduct.

Defendant next contends that his sentences constituted cruel and/or unusual punishment. Again, we disagree.

Generally, this Court reviews de novo issues of constitutional law. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). To preserve a claim of constitutional error, a defendant must contemporaneously object. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Because defendant failed to make an objection at sentencing, this claim of error is not preserved; thus, our review is for plain error that affected defendant's substantial rights. See *id*. at 763-764.

The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const Am VIII. If a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000). Sentences that are proportionate to the seriousness of the offense and the offender are not cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). A sentence within the guidelines range is presumed to be proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). In order "to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013), quoting *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Defendant argues that the mandatory 25-year minimum sentence for a first-degree criminal sexual conduct conviction constitutes cruel or unusual punishment. Whether a penalty or sentence imposed against a defendant can be considered cruel or unusual is to be determined by a three-pronged test including: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011), citing *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992).

In *Benton*, this Court addressed whether the mandatory 25-year minimum sentence for a first-degree criminal sexual conduct conviction violated the constitutional prohibitions against cruel or unusual punishment. *Id*. at 203. After addressing the three factors discussed above, this Court held that the statutorily mandated sentence of "imprisonment for life or any term of years, but not less than 25 years" for first-degree criminal sexual conduct against a child less than 13 years of age was not unconstitutionally cruel or unusual. *Id*. at 203-207.

Benton is controlling in this case. Defendant's conviction for first-degree criminal sexual conduct by an adult over age 17, against a child less than 13 years of age "is an offense that violates deeply ingrained social values of protecting children from sexual exploitation." *Id*. at 206. The statutory scheme allows for a sentence up to, and including, life imprisonment for such an offense, MCL 750.520b(2)(a), and, as discussed in *Benton*, such a punishment is not cruel or unusual.

Further, defendant's sentence for his second-degree criminal sexual conduct conviction, i.e., 10 to 15 years' imprisonment, was within the guidelines range of 81 to 135 months' imprisonment. Again, a sentence within the guidelines range is presumed to be proportionate, and a proportionate sentence is not cruel or unusual punishment. *Powell*, 278 Mich App at 323. Therefore, defendant's sentence for second-degree criminal sexual conduct was not cruel or unusual punishment.

Though defendant suggests that his age renders his sentence disproportionate, a court is not required to consider a defendant's age in determining whether a sentence is disproportionate. See *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). Thus, though defendant may be correct that his sentence, for all practical purposes, will be a life sentence for him, such a consideration does not render defendant's sentence cruel or unusual.

Finally, defendant's minimal prior criminal record is also insufficient to render the sentence cruel or unusual. In *Benton*, the defendant argued that her sentence was unduly harsh because her offense "did not involve any force, violence, coercion, or trickery," and she had no prior criminal record. *Benton*, 294 Mich App at 205. However, this Court held that these allegedly mitigating factors did not mean that the defendant "should be considered less culpable than most persons convicted of" first-degree criminal sexual conduct. *Id*. Similarly, defendant's minimal criminal record is insufficient to render his sentence cruel or unusual.

Affirmed.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot